MICHIGAN SUPREME COURT

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SUPREME COURT TO HEAR HEAD START-RELATED LAWSUIT NEXT WEEK

LANSING, MI, November 4, 2004 – A lawsuit involving access to documents under the federal Head Start Act will be heard by the Michigan Supreme Court next week.

In *Office Planning Group, Inc. v. Baraga-Houghton-Keweenaw Child Development Board, Inc.*, plaintiff Office Planning Group unsuccessfully bid to provide office furniture and cubicles for Head Start programs in three Upper Peninsula counties. The plaintiff claims that the Head Start Act's requirement of "reasonable public access to information" obligates the Child Development Board to provide copies of other bids. Both the Child Development Board and the U.S. Department of Health and Human Services have taken the position that the board was not required to provide copies of the bids. The board also argues that the Head Start Act does not give the disappointed bidder a cause of action.

The Court will also hear *Advocacy Organization for Patients & Providers, et al. v. Auto Club Insurance Association, et al*. The plaintiffs in that case challenge the "80th percentile test" used by a number of no-fault insurers to set the amount they will pay for medical bills. Under this test, an insurer compares the amount charged by a physician treating an insured person to the amount charged by other health care providers for the same procedure. A charge is found to be "reasonable" if it is no higher than the amount that 80 percent of health care providers charge for the same procedure.

Also before the Court are cases involving worker's compensation, civil rights, employment, and criminal law issues.

Court will be held on **November 9 and 10.** Court will convene at **9:30 a.m.** each day.

(*Please note: The summaries that follow are brief accounts of complicated cases and may not reflect the way in which some or all of the Court's seven Justices view the cases. The attorneys may also disagree about the facts, the issues, the procedural history, or the significance of their cases. Briefs in the cases are available on the Supreme Court's website at* http://courts.michigan.gov/supremecourt/Clerk/msc_orals.htm. *For further details about the cases, please contact the attorneys.*)

Tuesday, November 9
Morning Session

GARG v. MACOMB COUNTY COMMUNITY MENTAL HEALTH (case no. 121361)
Attorneys for plaintiff Sharda Garg: Monica Farris Linkner/(734) 214-0200, Allyn Carol Ravitz/(248) 960-9660, Beth M. Rivers/(248) 398-9800
Attorneys for defendant Macomb County Community Mental Health: Susan H. Zitterman, Karen B. Berkery/(313) 965-7905
Attorneys for amicus curiae Michigan Attorney General: Patrick J. O'Brien, Heather S. Meingast/(517) 373-6434
Attorneys for amicus curiae Michigan Civil Rights Commission and the Michigan Department of Civil Rights: Suzanne D. Sonneborn, Ron D. Robinson/(313) 456-0200
Trial court: Macomb County Circuit Court
At issue: The plaintiff, a woman of South Asian descent, sued her employer after she sought and was turned down for promotions. She claimed that her employer discriminated against her on the basis of her national origin. She also alleged that her employer retaliated against her for opposing sexual harassment and filing a grievance alleging national-origin discrimination. Did she present enough evidence to support her claims?
Background: Plaintiff Sharda Garg, who is of Indian ancestry, was employed by defendant Macomb County Community Mental Health as a staff psychologist. According to Garg, in 1981, she witnessed her supervisor, Donald Habkirk, snapping a female employee's bra strap and snapping the elastic on another female employee's underwear. During the same time period, Garg said, she was walking down a corridor when she felt someone touch her on the shoulder; she reflexively turned and struck the person who touched her, who turned out to be Habkirk. Garg did not file a grievance against Habkirk, or report this incident to her union. She did file a grievance later, in 1987, after unsuccessfully seeking a promotion. In the grievance, Garg alleged that her employer discriminated against her on the basis of her national origin. Because of this grievance, Garg claimed, she was repeatedly denied other promotions. Garg eventually sued her employer, alleging national origin discrimination, and also retaliation for filing the 1987 grievance and for opposing sexual harassment (which occurred, according to Garg, when she struck Habkirk). The jury ruled in favor of Macomb County Community Mental Health on the national origin discrimination claim, but returned a $250,000 verdict in favor of Garg on the retaliation claims. Macomb County Community Mental Health appealed, arguing that Garg had failed to present a prima facie case – enough evidence to support her claims – and that her claims should have been dismissed. The Court of Appeals disagreed, saying that reasonable jurors could differ on whether Garg presented sufficient evidence. Both Garg and Macomb County Community Mental Health appeal to the Supreme Court, raising issues concerning the sufficiency of evidence supporting Garg's retaliation claims, whether any of Garg's claims are barred by the statute of limitations, and whether prejudgment interest should be awarded.

PEOPLE v. YOUNG (case no. 124811)
Prosecuting attorney: Jon P. Wojtala/(313) 224-5796
Attorney for defendant Wayne L. Young: Valerie R. Newman/(313) 256-9833
Trial court: Wayne County Circuit Court
At issue: The Michigan Supreme Court's decision in *People v McCoy*, 392 Mich 231 (1974), requires a trial judge to *sua sponte* – that is, without a request from the defendant – give a

cautionary instruction to the jury concerning the unreliability of accomplice testimony where the issue of credibility is "closely drawn." The defendant in this case claims that the trial court erred by failing to give the jury that cautionary instruction. Should the Supreme Court reconsider *People v McCoy*?

Background: Following a jury trial, defendant Wayne Young was convicted of two counts of second-degree murder and other related crimes. The testimony against Young came primarily from Michael Martin and Eugene Lawrence. Martin testified that Young came to his home and asked for a gun to "hit a lick" – to rob someone of money and drugs. Martin did not have a gun, so Young called Lawrence, and then asked Martin to drive him to see Lawrence. Young and Lawrence spoke privately, and then Martin drove Young a few blocks away and dropped him off. Martin testified that he did not know that Lawrence gave Young a gun. He also testified that Young called him twice more that day. The first time, Young told Martin that he was deciding how to rob several people in a drug house. The second time, Young told Martin that he had shot two people in the head. Young later repeated this statement to Lawrence, and also disclosed where he had hidden the gun. Martin was questioned by the police in connection with the shootings; he told the police about Lawrence and Young. In addition, a third person told the police that Young had asked him for a gun. After being convicted, Young argued that the trial court should have instructed the jury about the unreliability of accomplice testimony, which would have caused the jury to more closely scrutinize the testimony Martin and Lawrence gave at trial. The Court of Appeals affirmed Young's convictions. Young appeals.

ADVOCACY ORGANIZATION FOR PATIENTS & PROVIDERS, et al. v. AUTO CLUB INSURANCE ASSOCIATION, et al. (case no. 124639)

Attorneys for plaintiff Advocacy Organization for Patients & Providers, et al.: Sheldon L. Miller, Barbara H. Goldman/(248) 213-3800

Attorney for defendant Auto Club Insurance Association, et al.: Stephen E. Glazek/(313) 596-9305

Attorneys for amicus curiae Coalition Protecting Auto No Fault: George T. Sinas, L. Page Graves/(517) 394-7500

Attorneys for amicus curiae Michigan Catastrophic Claims Association: Jill M. Wheaton, Joseph Erhardt/(734) 214-7629

Attorneys for amicus curiae Michigan Health and Hospital Association: Chris Rossman, Jason Schian Conti, Cynthia F. Reaves/(313) 465-7000

Attorneys for amicus curiae Michigan State Medical Society: Joanne Geha Swanson, Richard D. Weber/(313) 961-0200

Attorney for amicus curiae Property Casualty Insurers Association of America: George M. Carr/(517) 371-2577

Attorney for amicus curiae: Michigan Chamber of Commerce: James G. Gross/(313) 963-8200

Trial court: Eaton County Circuit Court

At issue: A physician treating an injured person for an accidental bodily injury covered by no-fault insurance may charge a "reasonable amount" for the services rendered. MCL 500.3157. No-fault insurers are required to pay "all reasonable charges incurred for reasonably necessary . . . services . . . for an injured person's care, recovery, or rehabilitation." MCL 500.3107. In this case, the plaintiffs challenge the method used by more than a dozen no-fault

insurance companies to determine whether a charge for medically necessary services is for a "reasonable amount."
Background: The plaintiffs are a group of individual medical providers, two guardians of catastrophically injured victims of automobile accidents, and an organization that acts as an advocate for health-care providers and patients. The defendants are either no-fault insurance companies, or the companies that such insurers hire to review medical bills arising from automobile accidents. In this lawsuit, the plaintiffs claim that the no-fault insurers have been systematically failing to pay the full, customary, and "reasonable" amount of their insureds' medical bills. Among other claims, the plaintiffs specifically challenge a test used by some no-fault insurers called the 80th percentile test. Under this test, the amount charged by a physician treating a no-fault insured is compared to the amount charged by other health care providers for the same procedure. A charge is found to be "reasonable" if it is no higher than the amount charged by 80 percent of health care providers for the same procedure. The plaintiffs also seek damages for communications made by the no-fault insurers to their insureds; they claim that the statements were inaccurate, were made in the course of a conspiracy, and interfered with the plaintiffs' contractual and business relationships with their patients. The trial court granted the defendants' motion for summary disposition and dismissed all of the plaintiffs' claims. The Court of Appeals affirmed the trial court's ruling. The plaintiffs appeal.

Afternoon Session

CAIN v. WASTE MANAGEMENT INC., et al. (case nos. 125111, 125180)
Attorneys for plaintiff Scott M. Cain: Edward M. Smith, Pamela K. Bratt/(616) 451-8496
Attorneys for defendant Waste Management Inc. and Transportation Insurance Company: Daniel W. Grow, James M. Straub/(269) 982-1600
Attorney for defendant Second Injury Fund: Gerald M. Marcinkoski/(248) 433-1414
Attorney for amicus curiae Ford Motor Company: Martin L. Critchell/(313) 961-8690
Attorney for amicus curiae Michigan Trial Lawyers Association: Daryl Royal/(313) 730-0055
Lower Tribunals: Worker's Compensation magistrate/Worker's Compensation Appellate Commission
At issue: The Worker's Disability Compensation Act (WDCA) provides for "scheduled benefits" for the permanent loss of either a specific body part or function. This case involves benefits for "specific losses," under § 361(2)(k) of the WDCA (leg), and benefits for "total and permanent disabilities," under § 361(3) (for either the loss of both legs, or "permanent and total loss of industrial use" of both legs). Is the plaintiff entitled to benefits for "specific loss" of his left leg, or for "total and permanent disability" benefits, or both?
Background: Scott Cain worked as a truck driver and trash collector for defendant Waste Management. In October 1988, an automobile crashed into the back of a Waste Management truck, pinning Cain up against the back of the truck and crushing his legs. Cain's right leg was amputated above the knee, but doctors were able to save his left leg with extensive surgery and bracing. In February 1990, Cain returned to work at Waste Management, handling clerical responsibilities. But his left leg continued to deteriorate, and he suffered a fracture in October. After additional surgery and therapy, Cain returned to work in August 1991. The parties could not agree on the amount of worker's compensation benefits that Cain should receive. Waste Management voluntarily paid for the "specific loss" of Cain's right leg. The Worker's

Compensation Appellate Commission found that Cain also sustained the "specific loss" of his left leg, and that he is entitled to "total and permanent disability" benefits. The Court of Appeals affirmed this ruling. The defendants appeal. The issues that the Supreme Court will consider include whether Cain has been properly awarded total and permanent disability benefits, whether the "loss of industrial use" standard can be applied to claims of "specific loss," and whether the Supreme Court's prior decision in *Pipe v Leese Tool & Die Co*, 410 Mich 510 (1981), should be overruled.

PEOPLE v. ROBINSON (case no. 125441)
Prosecuting attorney: Jon H. Hulsing/(616) 846-8215
Attorney for defendant Christopher Carl Robinson: Robert H. German/(616) 846-5850
Attorney for amicus curiae Prosecuting Attorneys Association of Michigan: Timothy A. Baughman/(313) 224-5792
Trial court: Ottawa County Circuit Court
At issue: Must a prosecutor who seeks to convict a defendant of perjury produce "strong corroborating evidence" showing that the defendant testified falsely? If the trial court in this case erred in dismissing the perjury charge, can defendant be tried again for perjury? Or would retrial amount to a violation of the double jeopardy clause, which protects a defendant who is acquitted from being prosecuted a second time for the same offense?
Background: A police officer suspected that the driver of a vehicle was intoxicated, so he signaled the vehicle to pull over. According to the officer, Timothy Polak had been driving and defendant Christopher Robinson was his passenger, but the two switched seats before the officer arrived at the vehicle. The officer went ahead and administered field sobriety tests to Polak, who failed them. Polak was arrested and charged with driving while intoxicated. At trial, Polak and Robinson both testified that Robinson – not Polak – was the driver. Polak was nevertheless convicted, and Robinson was then charged with perjury. At the perjury trial, the prosecutor called the arresting officer to testify, and read Robinson's testimony from Polak's trial into the record. After the prosecutor presented this evidence, Robinson asked the trial court to dismiss the perjury charge. He argued that the prosecutor needed to offer "strong corroboration" of the alleged perjury, and that the prosecutor failed to do so. The trial court agreed with Robinson and dismissed the case. The prosecutor appealed to the Court of Appeals, but that court dismissed the appeal. It concluded that the trial court's dismissal of the charges amounted to an acquittal on the merits and that, under such circumstances, retrial is precluded by double jeopardy. In support of this proposition, the Court of Appeals cited the Supreme Court's opinion in *People v Nix*, 453 Mich 619 (1996). The prosecutor appeals.

Wednesday, November 10, 2004
Morning Session only

OFFICE PLANNING GROUP, INC. v. BARAGA-HOUGHTON-KEWEENAW CHILD DEVELOPMENT BOARD, INC. (case no. 125448)
Attorney for plaintiff Office Planning Group, Inc.: Robert T. Daavettila/(906) 482-6310
Attorney for defendant Baraga-Houghton-Keweenaw Child Development Board, Inc.: Marcia L. Howe/(248) 489-4100
Trial court: Houghton County Circuit Court

At issue: The Head Start Act, 42 USC § 9839(a), establishes administrative requirements for Head Start programs, including a requirement of "reasonable public access to information . . . and reasonable public access to books and records of the agency . . . ." Does this statute create an implied private cause of action, allowing a disappointed bidder to sue a local Head Start agency for disclosure of all submitted bids?
Background: Defendant Baraga-Houghton-Keweenaw Child Development Board is a private, non-profit organization that runs federal Head Start Programs in three counties. In January 2001, the Board solicited bids for office furniture and cubicles. Plaintiff Office Planning Group did not attend the open meeting at which the bids were opened, but it learned soon after that it had been underbid, and that another company would receive the contract. The plaintiff was suspicious of the bid process, and sought copies of all bids from the Board. The Board refused this request. In September 2001, the plaintiff contacted the Department of Health and Human Services ("HHS"), which oversees Head Start programs, to get the information. In response, the HHS told the plaintiff that the Board was not obligated to provide this specific information. The plaintiff then filed a lawsuit, claiming that the Head Start Act obligated the Board to produce the written bids upon request. The Board responded that the Head Start Act did not create a right to bring such a lawsuit. The Board also argued that the court should defer to the HHS interpretation of the Head Start Act, and that, even though it did not produce copies of the actual bids, the Board nevertheless complied with its obligation to provide the plaintiff "reasonable public access." In November 2002, the trial court ruled in the plaintiff's favor, and ordered the Board to produce copies of the written bids. The Board appealed to the Court of Appeals, which held that the Head Start Act implies a private cause of action and affirmed the trial court's ruling. The Board appeals.

PEOPLE v. JENKINS (case no. 125141)
Prosecuting attorney: Mark Kneisel/(734) 222-6620
Attorney for defendant Shawn Leon Jenkins: Timothy R. Niemann/(734) 222-6968
Trial court: Washtenaw County Circuit Court
At issue: At what point was the defendant's consensual encounter with a police officer transformed into an investigatory stop, which gives rise to Fourth Amendment protections and must be supported by reasonable suspicion?
Background: During the evening of August 23, 2001, the Ann Arbor police received a complaint regarding a party in progress in the common area of a housing complex. The two officers who were dispatched to the scene found a gathering of 15 to 20 people drinking and talking; Shawn Jenkins and another man were seated on stairs leading to one of the housing units. An officer approached Jenkins, and the two engaged in a general conversation about the party. At that point, a woman emerged from the attached housing unit and asked Jenkins who he was and why he was seated on her porch. After hearing this, the officer asked Jenkins if he lived in the housing complex. Jenkins said that he did not, and the officer asked to see his identification. When Jenkins handed over his state identification card, the officer started to place a call to the Law Enforcement Information Network (LEIN). The officer testified that, at this point, Jenkins became nervous and began to walk away. The officer and his partner walked alongside Jenkins, encouraging him to wait for the results of the LEIN inquiry. When Jenkins did not stop, the officer told Jenkins that he was not free to leave. The LEIN inquiry revealed an outstanding warrant for Jenkins' arrest. As the officer was placing Jenkins in handcuffs, a gun fell from Jenkins' waistband to the ground. Jenkins was charged with carrying a concealed

weapon, possession of a firearm by a felon, and possession of a firearm during the commission of a felony. He moved to suppress the evidence on Fourth Amendment grounds, and sought dismissal of the charges. The trial court granted Jenkins' motion, and dismissed the case. The Court of Appeals panel affirmed the trial court's ruling, with one judge dissenting from the majority's ruling. The prosecutor appeals.

MAGEE v. DAIMLERCHRYSLER CORPORATION (case no. 126219)
Attorney for plaintiff Jacquelyn V. Magee: Juanita Gavin Hughes/(313) 961-5270
Attorneys for defendant DaimlerChrysler Corporation: Thomas A. Cattel, Debra A. Colby/(248) 593-6400
Trial court: Macomb County Circuit Court
At issue: The plaintiff claims to have suffered sex- and age-related harassment and discrimination during her employment with DaimlerChrysler. She filed a Civil Rights Act suit three years after her date of resignation, which was nearly five months after she went on medical leave for emotional distress. Was the plaintiff's suit timely filed?
Background: Jacquelyn Magee, who is an African-American, began to work for DaimlerChrysler in 1976. She went on medical leave for emotional distress after September 12, 1998, and resigned her job on February 2, 1999, without ever returning to work. On February 1, 2002, Magee sued under Michigan's Civil Rights Act, claiming that, during her 22 years of employment with DaimlerChrysler, she had been the victim of sex harassment, retaliation, and sex and age discrimination. Among Magee's allegations were claims regarding transfers in 1992 and 1994, and various episodes of harassment dating back to the 1980s. Magee alleged that from 1984, when she first complained of harassment, until she was forced to resign (or constructively discharged) on February 2, 1999, she was continuously subjected to a hostile work environment. Magee claimed that she went on medical leave on September 12, 1998, because of the harassment, and that DaimlerChrysler essentially forced her to retire. DaimlerChrysler filed a motion asking the trial court to dismiss Magee's lawsuit. DaimlerChrysler argued that Magee's claims were brought more than three years after she left the workplace, and therefore were brought after the expiration of the three-year statute of limitations for civil rights actions. The trial court granted this motion, but the Court of Appeals reversed, relying on the Supreme Court's decision in *Collins v Comerica*, 468 Mich 628 (2003). DaimlerChrysler appeals.

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